United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1312

To be argued by
STANLEY MARCUS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1312

UNITED STATES OF AMERICA,

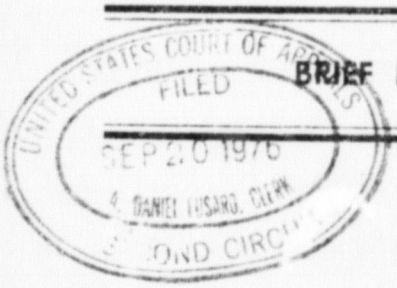
Appellee,

—against—

MARVIN D. CRISTENFELD,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE

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Preliminary Statement

Marvin D. Cristenfeld appeals from a judgment, entered in the United States District Court for the Eastern District of New York (Judd, *J.*) on June 24, 1976, after a jury trial, which convicted him of (1) extortion, both by the wrongful use of fear of economic loss, and under color of official right, in violation of Title 18, United States Code, Section 1951 (*Hobbs Act*) (Count One); (2) unlawful use of interstate facilities to carry on and promote extortion, in violation of Title 18, United States Code, Section 1952 (*Travel Act*) (Count Two); (3) three conspiracies to defraud the United States, in violation of Title 18, United States Code, Section 371 (Counts Three, Four and Six); and (4) aiding and abetting, counseling and advising the filing of false and fraudulent federal income tax returns, in violation of Title 26, United States

Code, Section 7206(2) (Counts Five, Seven and Eight). Appellant was sentenced on June 24, 1976 to a term of imprisonment of one year to run concurrent on all counts, with all but six months of the period of incarceration suspended, and a fine of $2,000. Appellant is free on bail pending this appeal.

Statement of Facts

Introduction

During the period of time covered by the indictment, the appellant, Marvin D. Cristenfeld, held two high positions of public trust—Chairman of the Nassau Democratic County Committee ("the Party") and Commissioner of the Nassau County Board of Elections. The bare facts adduced at trial made evident a long standing, pervasive and institutionalized pattern of political corruption in Nassau County ("the County"). Appellant Cristenfeld corruptly compelled businessmen doing business with the County to make substantial kickback payments both to him and his colleagues and to the Party. The evidence showed that in some instances appellant baldly demanded substantial cash payments from architects, engineers and real estate appraisers as the necessary price of obtaining personal service contracts from the County. Thus, in the case of Samuel Green (Counts One through Five), a consulting engineer doing business with the County, Cristenfeld wrongfully demanded approximately $44,000 in cash as the *quid pro quo* for the award of two large personal service contracts for the design of public sewage treatment facilities. At other times the demand was more subtle but the message was essentially the same: either "play ball" with and make payment to the Party and its leadership or be "shut out" from obtaining public works contracts. The evidence adduced

made clear that these kickback payments did not simply flow into the coffers of the Party, but also personally enriched appellant and his associates. For example, Green testified that he paid appellant some $12,000 in cash. The books and records of the Party and the testimony of its accountant demonstrated that this money never went to the Party. Moreover, the Green "connection" also involved the payment of approximately $18,000 to Harry Peltz, Jr., Esq., Mr. Cristenfeld's law partner, and the payment of approximately $6,000 to Olga Mrozack, Mr. Cristenfeld's personal secretary, all as part of the underlying extortionate demand of $44,000 in cash.

Mr. Cristenfeld also counseled and advised Green to take, as ordinary and necessary business expense deductions on his corporate income tax returns, these kickback payments to Peltz and Mrozack, thereby effectively having the United States Government discount the cost of the payments. The evidence also revealed that appellant counseled and advised at least two other businessmen, Herbert Pomerantz (Counts Six and Seven) and Peter Flack (Count Eight) to falsely declare kickback payments as ordinary and necessary business expense deductions on their federal income tax returns, employing the same modus operandi. Pomerantz was advised to make payments in excess of $11,000 to Donald Noonan and Albert Myers, associates of Mr. Cristenfeld at the Nassau Democratic County Committee. Peter Flack was advised by appellant to make payment to the Party by picking up a Party printing bill for $8,400, running it through his business and falsely declaring it as an ordinary and necessary business expense deduction.

The Green Counts

During most of the 1960's until January, 1971, Eugene Nickerson, a Democrat, served as County Executive of

Nassau County. From 1969 until 1973, appellant was the leader of the Democratic Party in Nassau County, occupying the position of Chairman of the Democratic Party in Nassau County.[1] In addition to Cristenfeld's Party position, he occupied the "Democratic Seat" as Commissioner of the Board of Elections for Nassau County,[2] and was also an attorney admitted to practice law in the State of New York. While the Democrats were in control of the County Executive's Office in Nassau County, Cristenfeld exercised considerable power over patronage in the Nickerson Administration (Tr. 61), and played a substantial role in the appointment of officials to the Department of Public Works (Tr. 59). Additionally, appellant was actively involved in fund raising activities for the Party (Tr. 254). Perhaps the most significant of Cristenfeld's many activities during the Nickerson years was his direct involvement in the award of "personal service contracts" by County departments and agencies.[3]

During the later Nickerson years, appellant became the most influential figure in the award of personal service contracts by the County Department of Public Works

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[1] Prior to 1969, appellant served as Vice-Chairman of the Party under the leadership of John F. English (Tr. 59-61, 243, 333, 704). (Reference key: Tr. — Trial Transcript).

[2] There are two Commissioners of Election in Nassau County, one Democrat and one Republican, each nominated by the respective Party Chairman and confirmed by the County Board of Supervisors (Tr. 239-241).

[3] Personal service contracts are awarded on a non-bid discretionary basis to architects, engineers, real estate appraisers and other professions, generally based upon their experience, qualifications, availability and political association with the Party (Tr. 315-316). In the case of consulting engineers and architects, these contracts usually involved drawing specifications and design plans for the construction of public works, such as sewage district treatment plants, hospitals and police stations (Tr. 56-57, 315-316).

(Tr. 75-82, 331-332, 346, 731, 774). In order to obtain these "no-bid contracts" and to continue working for the County, many personal service contractors found themselves obligated to make substantial kickback payments to the Democratic Party, to appellant and to his friends and associates (Tr. 81-84, 336-342, 466, 706-712, 774, 880-883).

One of many personal service contractors who made the regular pilgrimage to 240 Mineola Boulevard, the headquarters of the Party, was Samuel J. Green ("Green"), President of the Green Engineering Co. of Sewickley, Pennsylvania ("Green Engineering"). Green Engineering was involved in providing consulting engineering services in various states, as well as outside the United States (Tr. 316). In 1968, this Pennsylvania corporation opened a branch office in Hicksville, Long Island, operating under the name of Samuel J. Green Associates ("Green Associates") (Tr. 319).[4]

Contemporaneous with the opening of the Hicksville Office, Green Engineering received an engineering design contract for the survey of the Massapequa Park Sewage Collection District. Work on this project was performed by the Hicksville office although there was considerable travel between New York and Pennsylvania in connection with the performance of the contract (Tr. 324). As a result of this contract, which constituted something in excess of 90% of the work then pending in the Hicksville

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[4] A professional engineering business could not operate as a corporation in New York, and thus the Hicksville office operated as a partnership, wholly responsible to the parent corporation in Pennsylvania (Tr. 319-320). In essence, Green Associates operated as a branch office of Green Engineering. Green was the principal partner of the branch office and Victor Zelouf, an employee at the Sewickley office, was placed in charge of the Hicksville operation (Tr. 320-321).

office, Green Associates expanded its work force from three to twenty employees, many of whom were engineers (Tr. 327). Perhaps midway through the completion of the contract, work began to slow down and no new jobs were forthcoming to fulfill the capabilities of the new office (Tr. 330). In 1968 and 1969, both Green and Zelouf made various attempts to obtain further work from Nassau County and its subdivisions, without success. In addition, both Green and Zelouf attended various Democratic Party cocktail parties, dinner dances and other fund raising activities and, in addition, made regular contributions to the Party (Tr. 331-332). After attending various Party functions, attended by other architects and engineers as well, and after making various attempts to obtain work directly from the Department of Public Works, Green was informed by Victor Zelouf that the only way to receive new public work in Nassau County was from the newly designated Chairman of the Nassau Democratic County Committee, Marvin D. Cristenfeld (Tr. 332-333).

Thus, in the fall of 1969, Green visited appellant at Party headquarters (Tr. 333-334). Green told Cristenfeld of his firm's dire need for new work in Nassau County because the first contract was winding up, and his large staff had no other work to perform unless the County awarded another project (Tr. 336). Cristenfeld replied that he knew Green had previously obtained the Massapequa Park contract and also that Green Engineering had contributed to the Party in the past (Tr. 337). Cristenfeld then stated that there were contracts available for consulting engineers such as Green, including two particular sewage district treatment sections which were presently under County consideration, and that these two had not yet been assigned. Cristenfeld indicated that there was no reason why the Green firm couldn't obtain these

particular assignments but that in order to do so, Green would be obligated to pay a total sum of $44,000 for the two contracts, $20,000 for the first and $24,000 for the second (Tr. 339). Cristenfeld told Green that the $44,000 was to be paid in cash to him (Tr. 340-341). Cristenfeld flatly told Green during the course of the conversation that without the $44,000 payment he could not receive the contracts. Although Green had made kickbacks to public officials previously, and although the meeting was conducted in "a businesslike manner," Green indicated that he was shocked by the amount and the baldness of the demand (Tr. 341-342).

Green asked Cristenfeld for some time to think about the matter, left Cristenfeld's office, and drove around in his car for about half an hour "thinking about the various possibilities and consequences of taking the job; not taking the job." Realizing that he would probably suffer substantial economic loss, and indeed, be compelled to close up the Hicksville office altogether, he decided to make the commitment to pay appellant the $44,000 (Tr. 343-344). Green returned to Cristenfeld's office that same day and stated that he was hopeful he could find some means of paying the $44,000 in cash, although it would be difficult, and he agreed to undertake the "commitment" (Tr. 344-345). Cristenfeld assured him that all tickets to Party functions and journal advertisements would be counted toward the $44,000 commitment (Tr. 345). Green also indicated that during the course of the conversation Cristenfeld "made it clear without requiring a great many words that he was in a position to give out that work," and "that the work was his to give out." (Tr. 346).

Some years prior to Green's meeting with appellant, Green Engineering employed a cash "slush fund" to generate cash to make payments to public officials. This

program was known as the "employee bonus plan" and was directed by Stuart Friedman, the Controller of Green Engineering (Tr. 345-350, 625-629, Gov't. Ex. 23). A number of key executives of the corporation received bonuses, approximately one-third of which would be set aside for taxes, one-third would be retained by the executive and one-third would be returned to either Green or Friedman as part of the "slush fund" (Tr. 345-350, 625-629).[5] Friedman would collect the money from various executives of Green Engineering and maintain records on index cards of all commitments to public officials with the dates and amounts of payments made. These index cards were subsequently destroyed by Green and Friedman (Tr. 630-632). Friedman testified that he would regularly be advised each time that Green or another executive was required to make a payment in connection with a commitment (Tr. 628-633).

Friedman testified further that after Green's meeting with Cristenfeld, Green advised Friedman that he had met with Cristenfeld, that the New York office was in dire economic circumstances and that the only way the New York office would be able to obtain more work was by making a substantial payment to Mr. Cristenfeld. Friedman also indicated Green was told that unless a commitment of approximately $40,000 to $45,000 was made, no jobs would be obtained from Nassau County (Tr. 621-622). Friedman said Green returned from New York under heavy pressure to make the commitment and that it would be Friedman's responsibility to generate the cash to meet the demand. Friedman stated that additional sums had to be generated to meet the commitment to Cristenfeld because they had never made pay-

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[5] The controller of the corporation, Stuart Friedman, testified that the only way to obtain works contracts was to make payments to public officials (Tr. 624).

ments as large as the forty or forty-five thousand demand which Cristenfeld had made (Tr. 621-624, 630).

In December, 1969 Green made his first cash payment to Cristenfeld in New York. He arrived at Cristenfeld's office, having traveled from Pittsburgh, and the two proceeded to a diner in Green's car. Once inside the car, Green produced a white envelope and put it on the seat between himself and appellant. After Green advised appellant that the envelope contained $4,000 in cash, as part of the commitment, appellant picked it up and put it in his pocket (Tr. 351-352). Green indicated that Cristenfeld knew he had traveled from Pittsburgh to New York in order to make the payment (Tr. 352). On December 23, 1969 Green Associates received the Farmingdale Sewage District contract from the Nassau County Department of Public Works, one of the two contracts appellant discussed with Green at their initial meeting (Tr. 353).

Green made his next journey from Pittsburgh to New York in early February of 1970, and at that time delivered $3,000 to Cristenfeld, again in an envelope and again in an automobile on the way to a diner. On this occasion, Green advised appellant that he was encountering difficulty in generating such large sums of cash and asked appellant if he had any ideas "about enabling [them] to meet part of that commitment without using cash" (Tr. 355). Cristenfeld indicated that he might have some ideas in the near future (Tr. 356).

In early March, 1970 appellant placed a telephone call from New York to Pittsburgh to advise Green of another way to meet the commitment. Cristenfeld provided Green with the name of an attorney, Harry Peltz, Jr., whom Green was to place on retainer at the rate of $500 a month. The money paid to Peltz, Cristenfeld said,

would be counted as part of the underlying $44,000 commitment and could be considered a business expense (Tr. 356-357). It was understood that Peltz would not be performing any legal services for the Green companies (Tr. 637).[6] Green indicated that he had never had any prior conversation with Cristenfeld about an attorney in New York, that he already had attorneys handling his business with Green Associates and Green Engineering at the time, that those attorneys were competent to handle Green Engineering's legal affairs, and that he did not know Peltz's qualifications at all at the time (Tr. 358-359, 368-369). Indeed, unbeknownst to Green at the time of the telephone conversation, Peltz and Cristenfeld had entered into a law partnership some weeks before (Tr. 552).

Shortly after the conversation Green and Friedman drafted a retainer agreement with Mr. Peltz. Green stated that he and Friedman discussed the retainer agreement and "put it into the file to appear to make Mr. Peltz a

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[6] Stuart Friedman explained:

> "Well, the benefit of a free tax deduction in this situation would be to take the expense for legal counsel, although he was never to do any legal work. That was a known and given understanding. It would be simply to hire him and write quarterly or monthly—I don't recall how often it was done. It can be checked by the file. But to write monthly checks to him and take him as an ordinary business deduction as a professional service expense, which is an allowable expense. And by doing that it would come off our income, and therefore reduce our taxes to the Federal Government." (Tr. 637).

Green indicated that the benefit to be derived from this method of making the payment would be that the corporation would only be required to generate half as much money to make the commitment, that, in effect, the Government would be discounting the contribution by half, given the tax bracket that the corporation was in (Tr. 358).

legitimate legal counsel for the firm" (Tr. 361, 638). From March, 1970 to February, 1973, Peltz received monthly checks in the mail from Green Engineering together with a transmittal letter. Each check was in the amount of $500 with the exception of one month when the payment totalled $400, for a total of approximately $18,400 (Tr. 364, 582, 637, Gov't. Ex. 15). Peltz never performed any legal services for Green Engineering, Green Associates, Green or Zelouf during the entire period (Tr. 362, 565-574, 638). Files maintained by both Green Engineering and Harry Peltz, Jr. reflect that no legal matters were ever handled by Peltz (Gov't. Ex. 16, 22).[7]

Prior to receiving his first check from Green Engineering, Peltz was advised by Cristenfeld that a firm would soon contact him in order to retain him as an attorney; no other details were provided (Tr. 558). Throughout the three year period that he received checks, Peltz never met Samuel Green, Victor Zelouf, or any of the employees of the corporation or its New York branch office (Tr. 563). Indeed, he testified that he never spoke with anyone in the corporation concerning business matters, was unaware of the nature and size of the business and what type of services it provided. Peltz also said he did not know during the period of his retention that Green Engineering or Green Associates had ever received a public contract from Nassau County. Peltz also said that, to the best of his recollection, during the course of three years, he didn't do any actual legal work for the company (Tr. 569-570).

In June or July of 1970, appellant advised Green that he had yet another method whereby the commitment could be satisfied. Green was told to place Cristenfeld's personal

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[7] Virtually all of the documents in these files were transmittal letters sent with the checks (Tr. 638-640, 574-579).

secretary, Olga Mrozack, on the company payroll to lessen the cash impact since payments to Mrozack could be taken as "payroll expense deductions," and this method would thereby "save money on taxes and help generate the situation which would help us meet the commitment." (Tr. 370-371, 640-642). Green further indicated that Cristenfeld advised him to pay Mrs. Mrozack $50 a week (Tr. 370-371). It was not intended that Mrozack would perform any work either, nor did she actually perform any work (Tr. 371, 519, 641).

Mrs. Mrozack served as secretary to appellant when he became Chairman of the Party and continued as his secretary at the Board of Elections when he resigned as Chairman in 1973 (Tr. 505-507). During 1970 Mrs. Mrozack requested that appellant provide her with a salary increase. He advised her that "he would see what he could do," and later informed her that she would be receiving a check at her home from Green Engineering (Tr. 514-515). Soon thereafter Mrozack began receiving bi-weekly checks in the amount of $84.50 ($50 a week less withholding) (Tr. 516-518, Gov't. Ex. 17). She received these checks until January, 1973 in the total amount of approximately $6,000 (Tr. 519, Gov't. Ex. 17). After she began receiving the checks, Mrozack said she informed appellant of that fact and told him that if they [Green Engineering] "were in a bind where they needed typing or anything, I would be able to do so" (Tr. 522). She was never asked to perform any services for the companies by Cristenfeld, Green or Zelouf (Tr. 521).

In addition to the payments of $18,400 to Peltz, $6,000 to Mrozack, and $7,000 in cash as detailed hereinabove, other amounts were expended by Green Engineering in order to meet the $44,000 commitment. Green made two additional visits to Cristenfeld in 1970 and 1971, de-

livering $5,000 in cash to appellant, $3,000 on one occasion and $2,000 on the other (Tr. 379-380). These payments were made in the same way as the others: a white envelope containing cash handed over in an automobile on the way to a diner.[8] Approximately $5,400 in political contributions for journal ads, tickets and dinners were also made by Green and Zelouf to the Party, and these funds were also counted toward the demand (Tr. 379-381, 798-799, Gov. Ex. 21).

The payments to Cristenfeld were considered fully met in early 1973 (Tr. 642).[9] Green Engineering received both of the contracts which Cristenfeld had promised from the Department of Public Works. The second contract was the preliminary design of the Kings Point-Manhasset Sewage District, July 1970 (Tr. 384-385). Each of the two contracts involved fees in excess of $300,000 (Tr. 385).

Green Engineering took the payments to Peltz and Mrozack as ordinary and necessary business expense deductions on their corporate income tax returns for the years in question (Tr. 643-645). The controller of the company, Stuart Friedman, indicated that he prepared the income tax returns for the company and that it was clear at the time they were prepared that the payments to Peltz and Mrozack were neither ordinary nor necessary

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[8] The books and records of the Nassau Democratic County Committtee for the years in question detailing all political contributions to the Nassau Democratic County Committee do not reflect the $12,000 in cash paid to appellant (Gov. Ex. 31).

[9] The payments were continued after the Democrats left power in 1973 because "...it was irrelevant whether or not power changed or didn't change with political parties. When the commitment was made, it was a commitment to be honored and paid." (Tr. 643).

business expenses incurred by Green Engineering or any of its subdivisions.[10] Green also indicated that he knew the tax returns were false and fraudulent insofar as they claimed these payments as ordinary and necessary business expense deductions (Tr. 389).

The Pomerantz Counts

Another personal service contractor who found himself compelled to visit Party headquarters was Herbert Pomerantz. For many years Pomerantz was active in the Democratic Party in Nassau County. After serving as a Democratic Committeeman he secured a position as Deputy Commissioner of Public Works, upon the recommendation of then Vice-Chairman Cristenfeld (Tr. 57-60). Pomerantz served in the Department from 1965 to 1967, resigning his position to pursue a career as an engineer in the private sector. As a consulting engineer with offices in Manhattan, Pomerantz sought contracts from governmental entities, such as the Nassau County Department of Public Works. Some two years after his resignation Pomerantz began seeking public works contracts from his old employer on a regular basis, regularly visiting Commissioner Herbert Simins and Marvin Cristenfeld (Tr. 66-68).

Beginning in 1969, Pomerantz and Cristenfeld had a series of substantive conversations concerning the award of specific personal service design contracts—the Meadowbrook Hospital and the Nassau County Children's Shel-

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[10] The payments to Mrozack were taken as salary and wage expense deductions on line 13 of the corporate income tax return, and the payments to Peltz were taken on line 26 as professional service expenditures (Tr. 644, Gov. Ex. 21).

ter.[11] In late 1969, Pomerantz received the Meadowbrook Hospital contract from the County, a job which involved fees of $20,000 (Tr. 79-80). On one occasion, Cristenfeld indicated he was amenable to Pomerantz getting the Children's Shelter job but that he would have to increase his contribution to the Party substantially (Tr. 81-82).[12] Pomerantz told Cristenfeld that he was willing to increase his contributions but he needed "a less onerous way" of doing so (Tr. 82). Cristenfeld suggested that Pomerantz "carry" a party worker on the payroll so that Pomerantz could thereby obtain a tax deduction (Tr. 83-84).[13] This party worker ostensibly would be performing services for Pomerantz, so far as the books and records of the business and the Internal Revenue Service were concerned, but in reality this was a sham devised by Cristenfeld so Pomerantz could make payments to the Party and derive a tax benefit (Tr. 86, 88, 89, 230). Cristenfeld advised Pomerantz to place Albert Myers, a party worker for the Democratic County Committee, on the payroll and they agreed that Myers would receive a bi-weekly check for $670. Pomerantz asked Cristenfeld how to carry Myers on the payroll in order to make the deduction look good in case the Internal Revenue Service should examine it, and Cristenfeld indicated to him that Myers had some accounting background. Pomerantz

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[11] Consulting engineers performing design work on buildings would be hired as "consultants" to the architects who receive the prime award from the County. The selection of the engineers was subject to the approval of the Department of Public Works (Tr. 173, 216).

[12] At that time Pomerantz had been making political contributions of roughly $1,500 to $2,500 yearly (Tr. 82).

[13] By making a contribution in this method, Pomerantz added, he could claim the payments as ordinary and necessary tax deductions, and thereby decrease his gross income and subsequently his net income.

asked Cristenfeld to have Myers sent to his office so the necessary tax forms and W-2 statements could be prepared (Tr. 87-88, 96-97). It was clearly understood at the outset that Albert Myers would not perform any services for Pomerantz (Tr. 86-89).[14]

Myers was placed on the payroll the second week of January, 1970, and checks were mailed to him on a bi-weekly basis (Tr. 89, Gov. Ex. 5). In the middle of April, 1970 the Children's Shelter job, which appellant had promised to him, didn't materialize so Pomerantz removed Myers from the payroll for two pay periods (Tr. 103). After being reassured by Cristenfeld that the job would be forthcoming, Pomerantz placed Myers back on the payroll, but at a rate of $335 bi-weekly (Tr. 103-105, Gov. Ex. 3 and 5). Within two weeks no progress was made in obtaining the contract, and Pomerantz again reduced Myers' payments to $80 bi-weekly (Tr. 106, Gov. Ex. 3 and 5). Shortly thereafter, Pomerantz learned that he was being awarded the Children's Shelter contract by the County (Tr. 106-108, Gov. Ex. 6.) Cristenfeld advised Pomerantz that since he received the contract from Nassau County, he should place another party worker, Donald Noonan, on the payroll in the same manner. Pomerantz asked Cristenfeld, once again, what Noonan's background was so that if the Internal Revenue Service should ever ask, he could provide a reasonable explanation for the position. Since Noonan was going to law school, Pomerantz and Cristenfeld decided to have him "carried"

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[14] Throughout the entire period, Myers was employed full time working on political campaigns as an advance man. At the same time he also had a "no-show job," paying $14,000 a year at the County Executive's Office. He indicated that while his checks from Pomerantz went up, down and at times stopped altogether, at no point did Pomerantz or Cristenfeld explain the fluctuations to him (Tr. 853).

as a "spec writer." Noonan was not expected to perform any services for Pomerantz, nor did he do any work for him (Tr. 107). Pomerantz further testified that Cristenfeld knew Noonan was not performing any services for his company (Tr. 107). Cristenfeld and Pomerantz agreed that Noonan would receive bi-weekly payments of $200 and that Myers would be paid $200 bi-weekly as well at that time (Tr. 110-111, Gov. Ex. 3 and 5).[15]

Myers remained on the payroll until November, 1970, and was terminated pursuant to appellant's direction, after the election that fall (Tr. 113). Noonan's payments were terminated in April, 1971 after a conversation between appellant and Pomerantz (Tr. 113-114). The total payments made by Pomerantz Engineering to Noonan and Myers approximated $11,000, and were taken by Pomerantz on his tax returns as payroll expense deductions for the years 1970 and 1971 (Tr. 119, Gov. Ex. 5 and 10). Pomerantz testified that he realized these payments were not ordinary and necessary business deductions (Tr. 120).

The Flack Count

Peter Flack, a Manhattan based consulting engineer, was still another businessman who performed design contracts on behalf of the Nassau County Department of Public Works during the mid and late 1960's. Like other

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[15] Noonan indicated that he too asked appellant for a salary increase, and that appellant first arranged for him to receive weekly checks from Wittman Associates, a real estate appraiser receiving County contracts, in November, 1969. Wittman paid him $50 a week until April, 1971, although he only performed some ten hours of work in all. In the summer of 1970 appellant sent Noonan to see Pomerantz at his office. (Tr. 241-246, 264-267).

architects and engineers receiving or attempting to obtain County contracts, Flack attended Party fund raising functions and contributed between $1,000 and $2,000 yearly (Tr. 701-704). Flack found that a majority of the guests at the cocktail parties were architects, engineers and contractors. In addition, Department of Public Works officials, such as Commissioner Herbert Simins, were present as well as Party officials Cristenfeld and English (Tr. 702-703).

In the fall of 1968 Flack received a telephone call from Party Headquarters and was asked to meet with then Vice-Chairman Marvin Cristenfeld (Tr. 707). Flack proceeded to Party headquarters and met appellant in his office (Tr. 708). During the course of the conversation, appellant acknowledged that he knew Flack was doing work for the County and the Department of Public Works. Appellant asked Flack to make a "substantial" contribution, on the order of $8,000 to $10,000, to the Party. Flack advised Cristenfeld that he was willing to make a large contribution but that he did not have that amount of cash available. He asked Cristenfeld if there might not be another method by which he could make a contribution. Cristenfeld told Flack that since the Party had incurred substantial unpaid printing bills he could arrange through the printer, the Brooklyn Letter Service, to have printing sent directly to Flack's office so that Flack could "run it through [his] office" as a tax deductible item (Tr. 709-710). In arranging the payment of the printing bills in this manner, Flack could take the printing bills as an "'ordinary and necessary" business expense deduction and thereby discount the $8,000 to $10,000 contribution some forty percent, as if they had been actual printing expenses incurred in the ordinary course of Flack's business (Tr. 710, 761-764). After Flack agreed to make payment to the Party in this way, Cristenfeld explained that Flack would soon receive bills

from the Brooklyn Letter Service, Inc. Flack had never heard of the Brooklyn Letter Service, Inc. nor had he conducted any business with it (Tr. 712).

Shortly after the Flack-Cristenfeld meeting at Party headquarters, Cristenfeld contacted Samuel Paznick, President of the Brooklyn Letter Service, Inc.[16] Cristenfeld advised Paznick to send a bill to Peter Flack for approximately $8,000 of long overdue Party printing bills. (Tr. 811-812). Cristenfeld provided Paznick with the business address of Flack's company and the title "consulting engineer" (Tr. 814-815). Paznick testified that he never performed any printing services for Peter Flack.

Paznick prepared two invoices in the total amount of $8,400 which described certain brochures, descriptive of similar orders placed by the Party (Tr. 813-814)[17], and addressed them to Peter Flack, Consulting Engineer (Tr. 813-814, Gov. Ex. 26-27). After receiving the two invoices from the Brooklyn Letter Service, Flack paid the $8,400 bill with four business checks, all drawn in the year 1969 (Tr. 716-717, 816-817, Gov. Ex. 28). Neither Flack nor Paznick ever discussed the matter (Tr. 717, 816). As he received the Flack payments, Paznick credited $8,400 to the Party's account, and advised appellant (Tr. 818-819).

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[16] Paznick testified that over the years he had performed substantial printing services for the Nassau Democratic County Committee.

[17] Paznick indicated that the descriptions on the invoices sent to Flack did not reflect any printing work actually performed for Flack for the Party. He relied upon previous Party bills to draft these fictitious invoices. Paznick also testified that appellant never told him who Flack was or why he had agreed to pay Party printing bills (Tr. 812-813).

Flack took the $8,400 payment as an ordinary and necessary business expense deduction, specifically itemizing it as an office and postage expense on his 1969 federal income tax return filed in April, 1970. Flack indicated that it was clear from the nature and tone of the conversation which he had with Cristenfeld that it would be improper to take these payments as ordinary and necessary business expense deductions (Tr. 721).

The Howard Jackson Connection

Samuel Paznick, President of the Brooklyn Letter Service, sent another Party printing bill to still another businessman at the instruction of Cristenfeld. Paznick was advised to send a bill to Jackson and Rogers Appraisals, Inc., a real estate appraisal firm, 1527 Franklin Avenue, Mineola, New York, in the approximate amount of $1,500.[18] Paznick never performed any printing services for Jackson and Rogers, nor ever spoke to anyone connected with these real estate appraisers (Tr. 824). The Jackson invoice was fictitiously prepared on the same basis as the Flack invoices (Tr. 826). Although Paznick mailed the bill to Jackson and Rogers, he never received payment. After waiting some period of time, he decided to contact appellant rather than Jackson and Rogers, but never received any payment (Tr. 826-828).

At the time, Jackson and Rogers maintained real estate appraisal offices in Nassau and Suffolk Counties. As a real estate appraiser with some thirty years experience, Jackson performed appraisal services on behalf of many public and private entities (Tr. 869) and had served as a lecturer and real estate appraiser at many

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[18] Paznick sent an invoice in the amount of $1,554 (Tr. 822-824, Gov. Ex 33).

colleges and universities (Tr. 868). In 1968, Jackson attempted to obtain appraisal work from Nassau County. The County contracted with private real estate appraisers from time to time to represent them in connection with the assessment of real estate which would be seized in condemnation proceedings. Like personal service contracts involving architects and engineers, the real estate appraisal contracts with Nassau County were no-bid contracts and therefore within the discretion of the County Attorney's Office. Jackson's partner, Charles Rogers, arranged an appointment for Jackson with Morris Schneider, the Nassau County Attorney, through John English, then Party Chairman (Tr. 872). After meeting with Schneider, Jackson received his first assignment from the County Attorney's Office, a major tax assessment called "Ambac," in July, 1968 (Tr. 873). Jackson ultimately received approximately $15,000 in fees from this assignment (Tr. 875). In February, 1969 he received a number of additional assignments from the County Attorney's Office (Tr. 876).

In the fall of 1969 Jackson was called down to Party headquarters by appellant. Cristenfeld advised Jackson that he was aware of Jackson's contracts with the County in the area of real estate appraisal work. Appellant then told the appraiser that he was expected to contribute 10% of his fees to the Party, referring to the fees that Jackson had already received from the County (Tr. 879-880). Jackson testified that the tone and tenor of the conversation was such that he believed if he didn't pay the 10% demanded by Cristenfeld, he would never again receive work from the County (Tr. 881). Jackson then replied to Cristenfeld's demand: "I told him to go fuck' himself." Jackson left the premises and never received another assignment from Nassau County again (Tr. 881). Jackson never saw the invoice from the

Brooklyn Letter Service, and never paid such a bill or a 10% contribution or kickback to the Party or to any printer or to anyone else designated by Cristenfeld. He indicated that he neither met or spoke with Samuel Paznick (Tr. 881-883).[19]

The Defense

Appellant's defense consisted primarily of ten character witnesses whom he called to the stand. In addition, the defense called former Nassau County Deputy Attorney Michael Martone, who testified that Howard Jackson was "irascible and opinionated" and therefore he did "not recommend him" to other attorneys in the County Attorney's Office; he further indicated that he was never told by anyone at Democratic Headquarters not to use Howard Jackson (Tr. 1015-1016). Martone added, however, that Jackson was "highly qualified" and "one of the best testifiers around," and that his own law firm had occasion to hire Howard Jackson as a private consultant on real estate appraisal matters on at least five occasions (Tr. 1019-1022).

Appellant did not testify on his own behalf.

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[19] Testimony concerning the Jackson connection was admitted by the trial court as a "similar act" (Tr. 820-822).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED PRODUCTION OF THE GOVERNMENT ATTORNEYS' WITNESS INTERVIEW NOTES UNDER SECTION 3500.

Appellant contends that Judge Judd erroneously refused to disclose notes made by the Assistant United States Attorney of his interviews with each of three witnesses, Herbert Pomerantz, Samuel Green, and Peter Flack. This claim is without substance. The Assistant United States Attorney turned over the notes of his interviews with Pomerantz, Green and Flack to the trial court for an *in camera* inspection, at various stages during the trial (Tr. 234, 236, 460, 600).[20] The United States took the position that the interview notes were neither adopted, ratified, signed or otherwise approved by the witnesses [Section 3500(e) (1)],[21] (Tr. 193, 194, 233), *and* that they were not substantially verbatim con-

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[20] Appellant has suggested that there might be further interview notes in connection with an interview of Donald Noonan. During the trial the prosecutor indicated that there were no reports of interviews with Noonan (Tr. 280). The Government's good faith in meeting its *Jencks Act* responsibilities should be presumed, especially in light of the voluminous materials turned over to appellant in connection with pre-trial discovery proceedings. See, *e.g.*, Tr. at 191, 831. See, *Goldberg* v. *United States*, —U.S.—, 96 S.Ct. 1338, 1354 (Opinion of Powell, J.); *cf. Campbell* v. *United States*, 365 U.S. 85, at 103-104 (1961) (Opinion of Frankfurter, J.).

[21] Title 18, U.S.C., § 3500(e) (1) defines a statement as "a written statement made by said witness and signed or otherwise adopted or approved by him . . ."

temporaneous recordings [Section 3500(e) (2)], (Tr. 402-403).[22]

After listening to the extensive cross-examination of Pomerantz (Tr. 122-212, 231-233), questioning the prosecutor (Tr. 413),[23] and carefully examining the Pomerantz notes, Judge Judd declined to compel their production pursuant to Section 3500. Moreover, Judge Judd also found that the notes were "innocuous" (Tr. 297), and that there was no "evidence of suppression or change of testimony of any sort" (Tr. 413). After reviewing the prosecutor's scratch notes of Green,[24] and listening to his extensive examination at trial,[25] Judge Judd found first, that there was no indication that the witness had signed, adopted, ratified or otherwise approved the notes, and second that they did not constitute a verbatim statement of the witness (Tr. 884); thus, that the notes did not fall within § 3500(e) (1) or (e) (2). Similarly, with respect to the Flack notes,

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[22] Title 18, U.S.C., § 3500(e) (2) defines a statement in these terms:

> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

Appellant has erroneously suggested that the Government only took the position that the notes were never adopted, ratified or approved by the witness. (Appellant's Br. pp. 10, 12)

[23] The prosecutor told the trial court, outside the presence of the jury, that the Pomerantz notes consisted of two pages of scratch notes, and a chronology of events drawn up outside the presence of and subsequent to interviews with the witness, (Tr. 413-414) and that these notes were never shown to the witness, nor signed, ratified, adopted or confirmed in any way by him (Tr. 194).

[24] The prosecutor stated that the Green notes were his "personal notes" that he would only use as an aid in questioning the witness (Tr. 462).

[25] The Green cross-examination alone ran more than one hundred pages in the trial record.

Judge Judd again made an *in camera* examination, and, in addition questioned the witness *sua sponte*, (Tr. 788-789), in order to determine if he had ever signed, adopted, ratified or otherwise approved the prosecutor's scratch notes and jottings.

Despite this holding, which was well within the sound discretion of the trial judge, appellant disingenuously suggests that Judge Judd was required to state *in haec verba* that the materials did not constitute a stenographic, mechanical, electrical or other recording which is a substantially verbatim contemporaneous recital of an oral statement within the ambit of Section 3500 (e) (2). Of course Judge Judd did make such a finding with respect to the Green interview notes. But, at no point in the trial, did appellant's experienced trial counsel ever ask the trial court to make an explicit finding that any of the notes were not statements within the ambit of Section 3500(e) (2). Moreover, substantial argument over the production of the notes focused upon whether the various witnesses had adopted, ratified or otherwise approved notes because it was patently clear from the face of the notes themselves that they were not and could not be substantially verbatim recordings.[26] And, since

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[26] The prosecutor's Pomerantz' notes consisted of some three pages of scratch notes, and four-and-one-half pages of chronology. The Pomerantz federal grand jury testimony of October 8, 1975 ran some twenty-nine pages; the Pomerantz testimony before a grand jury in Nassau County, taken on April 30, 1971, ran some twenty-five pages; and Pomerantz' direct testimony at trial ran some seventy pages. The prosecutor's Flack interview notes covered five pages, while his federal grand jury testimony, taken on October 1, 1975 covered nineteen pages, and his Nassau County grand jury testimony, taken on four separate occasions in November and December of 1970 covered more than one hundred pages. The prosecutor's Green notes covered some sixteen pages of scratch notes and jottings while his federal grand jury testimony, taken on October 21, 1975, covered more than forty pages, and his direct trial testimony alone exceeded eighty pages.

Judge Judd, an experienced district court judge, was obviously familiar with the provisions of Section 3500, it is plain that his failure to use the exact words of the exceptions to Section 3500, upon which he was relying, hardly warrants a remand for such a superfluous exercise. Nor, in light of the proceedings which were already had in the district court, is a remand for a full blown hearing on this issue required. *United States* v. *Palermo*, 360 U.S. 343, 354-355 (1959).

Moreover, it is clear that Judge Judd's determination was correct. It is settled law that the determination whether a particular document falls within the ambit of § 3500 is ordinarily a question for the trial judge, whose finding will not be disturbed unless clearly erroneous. *Campbell* v. *United States*, 373 U.S. 487 (1963); *United States* v. *Catalano*, 491 F.2d 268 (2d Cir. 1974); *United States* v. *Covello*, 410 F.2d 536, 546 (2d Cir.) *cert. denied*, 396 U.S. 879 (1969). Not only were the trial court's findings amply supported by the record, but the case law itself holds that fragmentary scratch notes and jottings are not substantial recordings, and do not fall within the ambit of § 3500(e) (2). See, *e.g.*, *United States* v. *Thomas*, 282 F.2d 191, 194 (2d Cir. 1960). Indeed it would undermine the very purpose of Section 3500 and be grossly unfair to the witness, to compel production of fragmentary and incomplete notes for the purpose of impeachment, where it is clear that the witness' own words are not fully and without distortion reflected in the document. *Palermo* v. *United States*, *supra*. Interview notes are quite often selective, indeed episodic, and merely reflective of the investigator's impressions rather than a continuous, or even partial narrative of the witness. *Matthews* v. *United States*, 407 F.2d 137 (5th Cir. 1969), *cert. denied*, 398 U.S. 968 (1970); *United States* v. *Franzese*, 321 F. Supp. 993 (E.D.N.Y. 1970), *aff'd.* 438 F.2d 536 (2d Cir., 1971), *cert. denied*, 402 U.S. 995 (1971).

On the face of the prosecutor's notes in the instant case, it is quite apparent that they do not remotely resemble, even in part, a fairly comprehensive narrative of the witness' words. Moreover, nothing in *Goldberg* v. *United States*, *supra*, suggests that the disputed document need not fall within one of the definitions or statements enumerated in Section 3500(e). Mr. Justice Brennan recognized that:

> "Every witness interview will, of course, involve conversation between the lawyer and the witness, and the lawyer will necessarily inquire of the witness to be certain that he has correctly understood what the witness has said. Such discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes within § 3500(e) (1), which is satisfied only when the witness has 'signed or otherwise adopted or approved' what the lawyer has written. This requirement clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written." 96 S.Ct. at 1348 and n.19.

In the absence of any showing that the witnesses in the instant case ratified or adopted the prosecutor's notes, the trial court fairly denied their production.

Moreover, even assuming arguendo that Judge Judd erroneously refused to order the production of the prosecutor's notes, an analysis of the notes and the trial judge's explicit findings make clear that they were innocuous and in no way inconsistent with the testimony adduced at trial by Green, Pomerantz and Flack.[27] It is

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[27] After carefully reviewing the Green notes, the trial judge did inform appellant's counsel of one matter which might be pertinent to his inquiry (Tr. 884-885), even though it was not § 3500 material.

abundantly clear, moreover, that the doctrine of harmless error has been held applicable under § 3500, where the notes are innocuous and not inconsistent with the witness' testimony. See, e.g., *Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States* v. *Sten*, 342 F.2d 491 (2d Cir.), *cert. denied*, 382 U.S. 854 (1965).

In sum, appellant's contention that the trial court had improperly denied disclosure of these attorneys' notes should be rejected: first, because the trial judge properly examined the notes and concluded that they didn't fall within the ambit of § 3500 material; second, because its findings should not be disturbed unless completely erroneous; and third, because even assuming arguendo the notes were § 3500 material, there is an explicit trial finding that the notes were innocuous, and in no sense inconsistent with what the witnesses testified to at the trial, nor was appellant limited in any way from vigorously cross-examining Pomerantz, Green and Flack.

POINT II

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT A GUILTY VERDICT ON THREE COUNTS OF CONSPIRACY TO DEFRAUD THE UNITED STATES AND ON THREE COUNTS OF AIDING AND ABETTING, COUNSELING AND ADVISING THE FILING OF FALSE AND FRAUDULENT FEDERAL INCOME TAX RETURNS.

A. The evidence was sufficient to sustain the conviction of conspiracy to defraud the United States in violation of Title 18, U.S.C. §371 (Counts Three, Four and Six).

1. The Substance of Counts Three, Four and Six.

a) Count Three alleged that between March, 1970 and February, 1973 Cristenfeld and Green did knowingly, wilfully and unlawfully conspire to defraud the United States by obstructing and hindering the Internal Revenue Service in ascertaining and collecting information used in assessing and collecting taxes, and in the collection of taxes, and by making false, fictitious and fraudulent statements on Green's corporate income tax returns. At the core of this conspiracy was the agreement that Green, at the specific direction of appellant, would pay $500 a month to Harry Peltz, Jr., Esq., Cristenfeld's law partner, over some three years of time, although Peltz would perform no legal work, and then would falsely, fictitiously and fraudulently claim these payments as ordinary and necessary business expense deductions.

b) Count Four alleged that between July, 1970 and January, 1973 Cristenfeld and Green conspired to de-

fraud the United States, in the same manner alleged in Count Three. The core of this conspiracy was the agreement between Green and Cristenfeld, commencing at a date later than obtained in Count Three, to make payments of $50 a week to Olga Mrozack, appellant's personal secretary, and falsely declare them as ordinary and necessary business expense deductions, even though Mrozack would perform no services for Green or his business. In both counts (Three and Four) these payments were actually methods devised by Cristenfeld to enable Green to more easily meet the $44,000 demand that had been made upon him.

c) Count Six charged that between December, 1969 and April, 1972 Cristenfeld and Pomerantz conspired together to defraud the United States, again by obstructing and hindering the Internal Revenue Service. The core of this conspiracy was the agreement of Pomerantz, at the direction of appellant, to make payments totaling approximately $11,000 to Albert Myers and Donald Noonan, associates of Cristenfeld at the Party and the Board of Elections, and to falsely declare them as ordinary and necessary business expense deductions from his business, even though neither Noonan nor Myers performed any services for Herbert Pomerantz. Here, too, Cristenfeld devised the means whereby Pomerantz could more easily contribute to the Party and have the United States effectively discount a substantial part of that payment.

A conspiracy to defraud the United States under § 371 has a well established meaning:

> [Conspiracy to defraud the United States] reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any

> department of Government'. *Dennis* v. *United States*, 384 U.S. 855, 861 (1966) (quoting *Haas* v. *Henkel*, 216 U.S. 462, 479 (1910) as cited in *United States* v. *Johnson*, 383 U.S. 169, 172 (1966)).

Among the most basic of the lawful functions of the Internal Revenue Service is to properly audit and examine income tax returns. The reason for prohibiting any falsity on returns is that without truthful representations as to all matters, it becomes administratively more difficult if not impossible for the Internal Revenue Service to compute the amount of tax due or check on the accuracy of a return. *Divarco* v. *United States*, 343 F. Supp. 101 (N.D. Ill. 1972).

2. The Sufficiency of the Evidence.

Appellant contends that there was no showing he specifically intended to defraud the United States in connection with any of the business expense deductions taken by Green or Pomerantz. He suggests that he never realized these payments and the business expense deductions taken were not, in fact, bona fide, and therefore that the necessary intent was lacking. This claim is without substance.

a). Count Three

The evidence showed that Green and Cristenfeld met at Party headquarters in the fall of 1969, that appellant demanded approximately $44,000 in cash as the *quid pro quo* in the award of two large Nassau County personal service contracts and, that after making the second cash payment he advised appellant that he was encountering

difficulty generating substantial sums of cash. He asked appellant if he had any ideas about other methods which might be utilized to meet part of the commitment without using cash. Cristenfeld indicated that he might have some ideas in the near future, and on March 3, 1970 he called Green and said that he had devised such a method, that Green should place an attorney by the name of Harry Peltz Jr. on retainer, and pay him $500 a month. Cristenfeld told Green that these payments would be counted as part of the demand and could be considered as deductible business expenses, although it was understood from the start that Peltz would perform no legal services for Green. The evidence amply demonstrated that he did no work for Green Associates, Green Engineering, Green or any other corporate officer or agent.

Both Green and Friedman indicated that this method enabled them to falsely deduct the payments from the gross receipts of the business as ordinary and necessary expenses and thereby have the United States effectively discount the cost. Of course, Green never discussed any need for New York counsel with appellant, since he already had competent counsel handling all legal matters for Green Engineering and Green Associates, had never even heard of Harry Peltz before this conversation, and indeed was unaware, at the time, that Peltz and Cristenfeld had just entered into a law partnership.

The fraudulent nature of the scheme is also quite apparent from the retainer agreement which was drafted to make it appear as if Mr. Peltz was a legitimate counselor for the firm (Tr. 361), although again, it was clearly understood that he was not. Peltz received monthly $500 checks, totaling some $18,000 in all, during the entire time even though he never spoke with anyone in the corporation concerning business matters, was unaware of

the nature and size of the business, or that during the period of his retention Green Associates had received substantial contracts from Nassau County. Peltz was simply advised by appellant that a firm would be contacting him soon to retain him as an attorney; no other particulars were ever provided.

In sum all the extrinsic facts and circumstances, including the Peltz testimony, the files maintained both by Peltz and Green, and the testimony of Green and Friedman, amply support the jury finding that Green and appellant conspired to defraud the United States in violation of Title 18, U.S.C., § 371.

b). Count Four

The evidence showed that in June or July of 1970 appellant advised Green that he had still another method whereby the $44,000 commitment could be satisfied other than by simply making cash payments to him. Green was instructed to place Cristenfeld's personal secretary, Olga Mrozack, on the company payroll at $50 per week, since these payments too could be taken as "payroll expense deductions." It was understood by both appellant and Green that Mrozack would perform no work for Green Associates or Green Engineering. Mrozack, who was employed at the time as secretary to appellant, Chairman of the Nassau Democratic Party, and continued as his secretary at the County Board of Elections, received some $6,000, in all, although she never performed any secretarial or typing services for Green. These payments were also falsely declared as a wage and salary business expense on the Green returns. Taking the evidence in a light most favorable to the United States, appellant's guilty knowledge and intent was manifestly clear. Once again, it was he who devised the method,

instructed Green whom to pay, how much to pay, over what period of time to make payments, that the payments would be deductible, and finally that it would be considered as partial payment of the underlying $44,000 demand. And once again the Internal Revenue Service was obstructed in its lawful auditing functions.

c). Count Six

Although the names change, Count Six charges appellant and Pomerantz with utilizing the same modus operandi to defraud the United States. In the course of discussing the award of future work from the County, Cristenfeld asked Pomerantz to increase his contributions to the Party, and after Pomerantz asked if there was "a less onerous way," he instructed him to "carry" a party worker on the payroll so that Pomerantz could thereby obtain a tax deduction. By making a contribution in this way he, too, could claim the payments as ordinary and necessary tax deductions, decreasing his income and thereby ultimately having the United States discount the cost of the payments. The party worker ostensibly would perform services for Pomerantz, but in reality, as Cristenfeld and Pomerantz clearly understood, this too was a sham. It was Cristenfeld who instructed Pomerantz to place Albert Myers, a full-time party worker who had previously asked appellant for a pay raise, on the payroll, to pay him a bi-weekly check of $670.00, and carry him on the payroll as an accountant, thus making the sham expenditure deduction look good in case the Internal Revenue Service should audit his returns. It was also understood that Myers would perform no services for the business. Moreover, while Myers' salary fluctuated up and down from a high of $670.00 bi-weekly to $80.00 bi-weekly, including stops in payment, at no time did Pomerantz or Cristenfeld ever explain the

changes to Myers, although Pomerantz cleared each change with appellant.

The evidence also showed that Cristenfeld advised Pomerantz to place another party worker, Donald Noonan, on the payroll at a rate of $200 bi-weekly, shortly after Pomerantz was awarded the Children's Shelter contract and that since Noonan was going to law school at night he could be carried as a "spec writer" on the books and records of the firm. Noonan was employed as a full-time party worker by the Nassau Democratic County Committee, and as a full-time assistant at the Board of Elections in Nassau County, serving under the direction of Marvin Cristenfeld in both capacities. Thus Cristenfeld was well aware that Noonan had no time to work for Pomerantz, nor, of course, was it ever actually intended that he should work for Pomerantz.

In the face of this bald fact pattern appellant once again seems to suggest that he lacked the requisite knowledge or intent to defraud the United States, purportedly because he was unaware of what services Noonan actually performed for Pomerantz, if any. In fact the evidence involving both Green's relationship to Cristenfeld, and Pomerantz' relationship to him as well, makes clear that at every step of the way the instructions and advice for all of these schemes came directly from appellant. There is no relationship between Pomerantz and Noonan, or between Pomerantz and Myers, or between Green and Peltz, or between Green and Mrozack. Cristenfeld devised the scheme, Cristenfeld provided the names, and Cristenfeld directed the businessmen to pay so much per week or per month to his associates and colleagues, all for the purpose of enabling these taxpayers to deduct kickbacks to the Party, as ordinary and necessary business expense items, and thereby have the United States effectively discount the cost of these payments.

B. The evidence established that the business expense deductions taken by Green (Count Five), Pomerantz (Count Seven) and Flack (Count Eight) were false and fraudulent as to material matters within the purview of Title 26, United States Code, Section 7206(2).

Appellant suggests that, with respect to the substantive tax counts in the indictment, charging him with aiding and abetting the filing of false tax returns in violation of Title 26, U.S.C., § 7206(2) (Counts Five, Seven and Eight), the representations made by Green, Pomerantz and Flack concerning payments to Peltz, Mrozack, Noonan, Myers and the Brooklyn Letter Service Inc., respectively, were not materially false and fraudulent, but rather were properly deductible, presumably under § 162(a), Title 26, U.S.C., as ordinary and necessary business expenses incurred as part and parcel of the payors' trade or business. The payments, Cristenfeld alleges, were normal and expected, and were beneficial to the payors. In addition, he alleges that he lacked the requisite knowledge and intent to violate § 7206(2) as well. These claims are without substance.

1. The evidence adduced at trial, outlined hereinabove, makes quite evident that these payments were materially false and fraudulently reported on the income tax returns prepared by Green, Pomerantz and Flack in violation of Title 26, U.S.C., Section 7206(2). While appellant cites Section 162(a) of the Internal Revenue Code, which generally permits as a deduction all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including reasonable allowances for salaries or other compensation for personal services actually rendered, he completely

omits any reference to Section 162(c)(1) of the Internal Revenue Code, which flatly prohibits a business deduction for any illegal payments to government officials or employees. Section 162(c) (1) prohibits a business expense deduction to be claimed for any payments made directly or indirectly, to an official or employee of any government or agency or instrumentality of any government if the payment constitutes an illegal bribe or kickback. Thus it is abundantly clear, contrary to appellant's claim, that illegal kickback payments to Cristenfeld, his associates and colleagues, are not deductible as ordinary and necessary business expenses. The testimony of Green and Friedman established that the payments to Peltz and Mrozack were illegal kickback payments in partial satisfaction of the $44,000. Pomerantz likewise testified that the payments which he made to Noonan and Myers, and which he reported as ordinary and necessary wage and salary expense deductions, were also illegal kickbacks to Cristenfeld's associates and colleagues at the Party. And finally, Peter Flack indicated that he too assumed the cost of the Party expenses, in this case printing bills incurred by the Nassau Democratic County Committee, paid for them himself, ran them through his business as ordinary and necessary business expense deductions, and thereby generated payments to Cristenfeld and the Party. The methodology remains the same in all three substantive tax counts. Again, Cristenfeld remained at the center of the scheme and artifice. Cristenfeld instructed Green, Flack and Pomerantz what to take as tax deductible items, how to take them as tax deductible items, how much to pay, and when to pay, all for the purpose of having the United States underwrite the cost of these kickbacks to the Party apparatus and its personnel.

2. Appellant alleges in this connection, however, that with respect to the attorney, Harry Peltz Jr., the evidence showed that he was ready, willing and able to

work for Green, and that there was a viable and enforceable retainer agreement between them, which evidenced the validity of this deduction. The evidence is to the contrary. First it was clear from the start to Cristenfeld and Green that the payments to Peltz were simply a method by which Green would meet the underlying demand, rather than a lawful attempt to obtain an attorney for Green Engineering in New York. In fact this is shown by the very context of calls placed by Cristenfeld to Green on March 3, 1970, coming after Green had complained about the difficulty he was having in generating cash to meet the demand. The evidence also showed that Peltz neither performed any services for Green or his businesses nor even had any idea of the nature of Green's business and that the retainer letter was merely a sham drafted to mislead the Internal Revenue Service should there be an audit. There never was any question that the declaration of these payments on the income tax returns for the fiscal year ending March 31, 1971 was false and fraudulent. Both Green and Friedman stated that that they knew it and that appellant knew it.

3. Appellant also seems to suggest that the prosecution failed to establish a tax deficiency on the Green, Pomerantz and Flack counts, as if that were somehow an element of a charge under § 7206(2). As a matter of law, it is clear that there is no requirement that a tax deficiency be shown in order to make out a prima facie case. See, e.g., *United States* v. *Rayor*, 204 F. Supp. 486 (S.D. Cal. 1962); *Hull* v. *United States*, 324 F.2d 817 (5th Cir. 1963). This is so because the purpose of Section 7206 is to insure that the Internal Revenue Service is presented with a complete and truthful disclosure, so that it can properly audit the return and allow or disallow claimed deductions. The reason for prohibiting any falsity on the return is that without truthful repre-

sentation as to all matters, it becomes administratively more difficult, if not impossible, for the Internal Revenue Service to compute the amount of tax due or check on the accuracy of the return. *Divarco* v. *United States supra.* Consequently, what is claimed as a deduction must be stated truthfully and is of the utmost materiality. Where truth is not present the section is violated. *United States* v. *Rayor, supra; Butzman* v. *United States,* 205 F.2d 343 (6th Cir.), *cert denied,* 346 U.S. 828 (1953).

Here it was shown that the whole purpose behind claiming these payments as ordinary and necessary business expense deductions was to prevent the Internal Revenue Service from properly auditing and disallowing these expenses, even though they were in fact political kickbacks and contributions to the appellant and his associates and colleagues, and the Party. In other words, even if these deductions would somehow have been properly allowable as an ordinary and necessary business expense deduction under § 162(a), a proposition which is clearly erroneous in light of the flat stricture of Section 162(c) (1) and the evidence adduced, there would still be a violation of § 7206(2) insofar as the deductions were intentionally and falsely denominated as wage and salary expenses, postage expenses and legal expenses.

The only real factual issue before the jury on these counts involved whether Cristenfeld had the requisite intent to aid and abet Green, Pomerantz and Flack. In each instance, the conversations between Cristenfeld and Green, Pomerantz, and Flack, clearly evidenced such an intent. Like the Green and Pomerantz counts described hereinabove [28] the Flack-Cristenfeld relationship manifested the specific knowledge and intent on the part

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[28] See discussion, *supra* at pp. 31-35.

of appellant. Cristenfeld advised Flack that since the Party had unpaid printing bills, he could arrange for the printer to send printing bills directly to Flack's office so that Flack could "run it through his office" as a tax deductible item (Tr. 709-10). Flack too could effectively contribute $8,000 or $10,000 to the Party, deduct it as ordinary and necessary business expenses and have the United States effectively discount a substantial contribution to the Party. Cristenfeld, of course, knew that the printer had performed services for the Party, not for Flack, and that Flack would be taking these expenses as business deductions, having advised him to do so in the first place for the very purpose of enabling him to more easily make payments to the Party. See *United States* v. *Gross*, 375 F. Supp. 971, (D.C. N.J. 1974) *aff'd.*, 511 F.2d 910 (3d Cir. 1975); *United States* v. *Goldstein*, 342 F. Supp. 661 (E.D.N.Y. 1973) *rev'd on other grounds*, 479 F.2d 1061 (2d Cir. 1973).

It is difficult to believe that appellant would seriously contend he had no idea that what was being done by Green, Pomerantz and Flack was illegal. He knew what the purpose of the scheme was, and the evidence was more than sufficient to permit the jury to infer that he knew that Peltz, his law partner, Mrozack, his personal secretary, and Noonan, his assistant at both the Party and at the Board of Elections, and Myers, his assistant at the Party, in fact, were doing no work for Green and Pomerantz. And, of course, he knew that the Brooklyn Letter Service performed no services whatsoever for the consulting firm of Peter Flack. In short, it is difficult to imagine what else Cristenfeld could have done to have made himself more a part of these illegal schemes and conspiracies to defraud the United States, and aid and abet in the filing of false tax returns, than he did with respect to Green, Pomerantz and Flack.

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A CONVICTION OF EXTORTION, BOTH BY FEAR OF ECONOMIC LOSS AND UNDER COLOR OF OFFICIAL RIGHT, IN VIOLATION OF TITLE 18, U.S.C. § 1951, AND OF EXTORTION IN VIOLATION OF 18 U.S.C. § 1952.

A. The proof was sufficient to support a finding that appellant extorted $44,000 from Samuel J. Green by fear of economic loss, in violation of Title 18, U.S.C. § 1951, the *Hobbs Act*.

Appellant contends that, as a matter of law, the evidence was insufficient to convict him of extortion by fear of economic loss (Count One) because Green was the willing payer of a bribe rather than the coerced victim of an extortion plot executed by appellant. This claim is without substance.[29]

The evidence which we have detailed at pp. 6-13, *supra*, is more than ample to sustain a jury finding that Green made the payments in question because he was afraid that, if he did not, he would suffer economic injury. Moreover, Judge Judd properly instructed the

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[29] It should be noted that the Court need not address itself to the validity or sufficiency of all of the counts of the indictment, if one or more are found to be sufficient, because under the concurrent sentence doctrine the validity of convictions on other counts carrying sentences concurrent with that of the valid conviction need not be considered. *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Tager*, 479 F.2d 120 (10th Cir. 1973).

jury on the distinction between extortion by fear of economic loss and mere voluntary payments gratuitously tendered by businessmen. Judge Judd pointed out that fear of economic loss is fear, as that term is used in the section, and that fear means essentially a state of anxious concern or alarm over anticipated economic loss or adverse effect on business. On the other hand, the mere voluntary payment of money unaccompanied by any fear of economic loss is not extortion, and thus if the jury were to accept "Mr. Gillen's interpretation, that perhaps Mr. Green was just trying to ingratiate himself by making payments which were not solicited, that would not constitute extortion." (Tr. 1135).

Indeed, at trial appellant acknowledged that the evidence, if credited by the jury, was sufficient to sustain a finding that the payments from Green were induced by fear of economic loss. At the close of the case-in-chief, his counsel stated (Tr. 887):

> "I most respectfully submit, Your Honor, there is no evidence here of this alleged color of official right. There is evidence by Mr. Green, if believed, that could possibly support some theory of fear of economic loss. I most respectfully submit that there is no evidence in the case taking into account Mr. Green's entire testimony and that is the testimony on which the extortion count is based of color of official right.
>
> "Mr. Green has testified, to wit: 'Stick 'em up.' He hasn't testified as to any fear whatsoever of official action. He's testified—if he's believed, that is an absolute shakedown."

At a later point, Mr. Gillen argued (Tr. 888):

> "What I'm saying, the facts of this case, Mr. Green's testimony, if believed, forecloses any fear

> of public officials or color of official right. He testifies to an actual—you know, pay or die situation, you know, 'pay or else'. There is no other interpretation."

Moreover, contrary to appellant's suggestion that extortion and bribery are mutually exclusive crimes, and that the same fact pattern would not permit a finding of extortion if at the same time some evidence of bribery also obtained, the law is well settled that the crimes are not exclusive, indeed that they tend to overlap, and that the essential inquiry is whether, as Judge Judd charged, the requisite element of fear is present. *United States* v. *Hathaway*, 534 F.2d 386 (1st Cir. 1976); *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Demet*, 486 F.2d 816, 820-821, n.3 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *United States* v. *Kahn*, 472 F.2d 272, 278 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

In sum, there was sufficient evidence for the jury to find that Green was compelled to pay Cristenfeld $44,000 or never again obtain public contracts from Nassau County, and that if he failed to obtain future work, he would have to shut down his New York branch office at considerable economic loss. To be sure, Cristenfeld was approached by Green, rather than vice versa, but it was Cristenfeld who demanded $44,000 in cash, and it was Cristenfeld who flatly told the defendant that if payment was not made, no work would be obtained. As the Court of Appeals made clear in *United States* v. *Hyde*, 448 F.2d 815, 834 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972):

> "The fact that relations between the victims and the extorters were often cordial is not inconsistent

> with extortion. Knowing that they were at the mercy of the Attorney General's office, it is a fair inference that the victims felt that to save their businesses they had to keep the extorters satisfied."

The jury surely could and did find that Green was reasonably apprehensive and fearful and that Cristenfeld wrongfully exploited that fear and, therefore, committed extortion in violation of the *Hobbs Act*. *United States* v. *Hathaway, supra*).[30]

B. The evidence also established that appellant Cristenfeld had committed extortion under color of official right.

A substantial number of recent *Hobbs Act* cases have established that the *Act* is to be read in the disjunctive, thereby permitting the prosecution of a person who induces his victim to part with the desired property both by fear of economic loss, and in the alternative, under color of official right, although either theory is sufficient to sustain a conviction. *United States* v. *Nar-*

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[30] Appellant also seems to suggest that Green lacked a pre-existing property right or interest in obtaining contracts from the Nassau County Department of Public Works, that he was simply seeking a no-bid discretionary personal service contract and therefore, as a matter of law, there could be no economic loss within the terms of the *Hobbs Act*. This argument is frivolous. It is clear as a matter of law, that the meaning of fear of economic loss under the *Hobbs Act* does not require a formally vested pre-existing property right. *United States* v. *Tropiano*, 418 F.2d 1069, 1075-1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States* v. *Hathaway, supra*. See *United States* v. *Addonizio, supra; United States* v. *Hyde, supra*.

dello, 393 U.S. 286, 289 (1969); *United States* v. *Hathaway, supra; United States* v. *Staszcuk*, 502 F.2d 875 (7th Cir. 1974), panel opinion adopted 517 F.2d 53 (7th Cir. 1975), *cert. denied*, —U.S.—, 18 Cr. L. 4014 (1975); *United States* v. *Crowley*, 504 F.2d 992, 994-95 (7th Cir. 1974); see also Stern, *Prosecution of Local Political Corruption Under The Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1 (1971).

Appellant seems to contend, however, not that it was improper to submit the charge of extortion to the jury on the alternate theories of fear of economic loss and under color of official right, but that there was no proof of payments induced "under color of official right." Even though appellant held both the position of Commissioner of the Board of Elections, Nassau County, and Chairman of the Nassau Democratic County Committee at the same time, appellant claims he did not and could not act under color of official right.

In adopting the *Hobbs Act* in 1946, Congress clearly incorporated the common law definition of extortion, expanded it and added as a disjunctive and expansive clause the "force or fear" definition. See Note, *Extortion "Under Color of Official Right": Federal Prosecution of Official Corruption Under the Hobbs Act*, 5 Loyola (Chicago) U.L.J. 515, 520 (1974). The *Hobbs Act* represents the first federal attempt at defining extortion. Like the *Anti-Racketeering Act of 1934*, which it replaced, it incorporated the disjunctive prohibitions against wrongful taking of property by use of force, violence or fear or under color of official right. Where the common law definition of extortion included the color of official right phrase of the *Hobbs Act*, and prohibited a public official from corruptly *demanding and receiving*

under color of office a payment that he was not entitled to, the *Hobbs Act* official right language is somewhat broader, not referring to a demand for payment but rather prohibiting *obtaining such payment*. Congress also discarded the word "corruptly" for "wrongfully," and substituted the "color of official right" for "color of office." See Stern, *supra*, at 14. The extortion is said to inhere in the abusive use of office alone without any independent showing of fear being necessary, because the fear is said to be implicit within the power of the office itself. See, e.g., *United States* v. *Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, — U.S. —, 19 Cr. L. 4058 (1976); *United States* v. *Staszcuk*, *supra*, at 877-878, 883; *United States* v. *Braasch*, *supra*, at 151 and n.8.

The meaning of "under color of official right" in *Hobbs Act* prosecutions has now developed to the point where the extortionist is said to act "under color of official right," even though he has no *de jure* or statutory power to affect the victim's business. Rather the central inquiry is whether or not, based on the representations made by the extortionist, and the facts and circumstances surrounding the demand, the purported victim reasonably perceived that a governmental decision would be made in a particular manner, and whether that belief was exploited by the defendant. Thus, in *United States* v. *Mazzei*, 521 F.2d 639 (3rd Cir.) (en banc), *cert. denied*, 96 S.Ct. 446 (1975), it was held that the phrase "color of official right" in the *Act* proscribes a defendant office-holder's receipt of payments for assuring that a governmental decision will be made in a particular manner, even though the office-holder had no statutory or *de jure* power to make the decision, so long as victim "held, and defendant exploited, a reasonable belief that the state's system so operated that the power in fact of the defendant's office included the effective author-

ity to [make the decision]." *Mazzei* at 643. The Court of Appeals focused not on the common law definition of extortion, but rather upon the victim's perception, and the exploitation of that perception by the defendant. If the requisite reasonable belief exists in the mind of the victim, it makes no difference whether the official is juridically empowered to act, or simply holds himself out as having that power, even if in fact he lacks that power, so long as the belief is reasonably based.

The holding in that case is consistent with the findings of other federal courts which have ruled on the meaning of official right under the *Hobbs Act*. Thus, for example, in *United States* v. *Price*, 507 F.2d 1349 (4th Cir. 1974), the defendant occupied the position of Chairman of the City Council, and he purportedly arranged for an expedited issuance of a motel occupancy permit despite existing building code violations. The defendant represented to the victim that he had the actual power and control over the permit issuing process, assuring the victim that if he had consulted with him previously he would have obviated any delay in obtaining the permit. The defendant asserted that since the County Council Chairman has no *de jure* power to issue the occupancy permit the money was not obtained "under color of official right." The jury was instructed by the trial judge that "[i]t is not necessary [for conviction] that you conclude that the defendant could in fact assure the issuance of the occupancy permit . . . The issue . . . is not whether the defendant had the power to withhold the permit, but whether it was reasonable for [Scotsman to believe] that he . . . had such power." *Price, supra*, at 1350. The Court of Appeals held that this was a correct instruction of the meaning of extortion and that it fully applied where "the victim's belief was predicated upon the appellant's assertion of *de facto* power over the

issuance of the permit." *Id.*[31] See, also, *United States* v. *Emalfarb*, 484 F.2d 787, 789 (7th Cir.), *cert. denied*, 414 U.S. 1064 (1973); Cf. *United States* v. *Varlack*, 225 F.2d 665 (2d Cir. 1955).

In the instant case appellant Marvin Cristenfeld, Commissioner of the Board of Elections and Chairman of the Nassau Democratic County Committee, held himself out to the victim, Samuel J. Green, as having the power to award or not to award personal service contracts issued by the Department of Public Works of Nassau County. After attending various party functions at which officials of the County Department of Public Works, the Party, and other architects and engineers were present, Green learned that the only way to receive new public works contracts in Nassau County was through the Chairman of the Democratic Party, Marvin Cristenfeld. Thus, in the fall of 1969 Green visited Cristenfeld at Party headquarters. Green testified that Cristenfeld was familiar with the County work that Green had previously obtained, specifically the Massapequa Park contract, and he also knew that Green had contributed to the Party in the past. Cristenfeld explicitly stated that new public works contracts for the design of two sewage district treatment plans were available; that the two sections of this new program had been divided into subsections; and that each subsection constituted a separate contract. He told Green that two contracts had not yet been signed; that there was no reason why the Green firm could not obtain them, but that in order to do so Green would be obligated to pay

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[31] The Court also ruled, in the alternative, that the conviction was supportable under the Section 1951(b)(2) definition of extortion of money obtained by fear of economic loss, on which the jury was also instructed.

a total of $44,000, $20,000 for the first contract and $24,000 for the second. Cristenfeld flatly told Green that unless the $44,000 payment was made he would not receive the contracts. Cristenfeld made it perfectly clear that he was in a position to give out the work. Of course, after initial payment was made, Green obtained the two contracts. These assertions, coupled with his prior experience in Nassau County, and the communications he had with Victor Zelouf, Green's local agent, led Green reasonably to believe these *de facto* assertions of public power. Indeed appellant's assertions that "he" had the authority to award contracts are clearer than the assertions made by State Senator Mazzei in *United States* v. *Mazzei*, *supra*, or by Councilman Price in *United States* v. *Price*, *supra*, or by Emalfarb in *United States* v. *Emalfarb*, *supra*. It is difficult indeed to imagine a fact pattern more clearly falling within the ambit of extortion under color of official right.

Appellant suggests, however, that since Green dealt with him in his capacity as Chairman of the Nassau Democratic County Committee, his position as Commissioner of the Board of Elections is not material and that the Chairman of the Nassau Democratic County Committee is not a public office. While it may be that, under ordinary circumstances a party chairman is not a public official, it is plain that New York State law clothes the party chairmen with governmental authority that goes well beyond that of an ordinary party official.

Under Section 51 of the New York State Election Law, the Chairman of the Nassau County Committees of the two political parties with the highest number of votes in any preceding election—the Democratic and Republican Parties—are empowered by the State to recommend and certify with the Board of Supervisors two persons to be appointed as Commissioner of Elections.

If at any time a vacancy occurs in the office, the chairmen are required to submit a replacement.[32] In short, the New York Legislature has directly and explicitly conferred upon a County Chairman authority which makes him a public official. As Mr. Justice Bernard Meyer observed: "Since in making the nomination of a Commissioner under Election Law Section 52 the . . . County Democratic Chairman participates in a governmental function, he is to that extent a public official . . ." *Ahern* v. *Board of Supervisors of Suffolk County*, 17 Misc. 2d 164, 171 (1959), *rev'd. on other grounds*, 7 A.D. 2d 5[illegible] (1959), affirmed 6 N.Y. 2d 376 (1959).

Moreover, under § 30(2) of the New York State Election Law, the Legislature has provided that the Commissioner of Elections may simultaneously hold only certain designated positions, including his party position. The Legislature has thereby sanctioned the custom that the Party Chairman can, and usually will, designate himself to be Commissioner of Elections. In short, the two positions are tied together by law and custom.

Cristenfeld, in this case, was first appointed Commissioner back in 1965, when he was Vice-Chairman of the Party. He subsequently reappointed himself more than once, when he was Chairman of the Party, to the position of Commissioner. As the Commissioner of the Board of Elections, of course, he was paid a substantial

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[32] Only recently Mr. Cristenfeld's successor as Nassau Democratic County Committee Chairman, Stanley Harwood, nominated himself to succeed Mr. Cristenfeld as a Commissioner of the Board of Elections. A challenge to the constitutionality of procedure, prompted by Mr. Harwood's nomination, was rejected by the New York State Supreme Court, N.Y.L.J., September 3, 1976, p. 1, clms. 2-3.

public salary.[33] Under the law of the State of New York both the County Chairman and the Commissioner of the Board of Elections are fully empowered to effectuate and enforce the entire state election apparatus. The two positions are inextricably intertwined, and together, if not standing alone, they clearly manifest the necessary public office to support a Section 1951 extortion charge "under color of official right."

In sum, the evidence adduced at trial suggested that Cristenfeld held himself out as a powerful public official holding *de facto* control over the allocation of public contracts, that he was reasonably perceived to have that power, and that he wrongfully exploited his power to derive payments from those wishing to do business with the County. It is difficult indeed to imagine a fact pattern more clearly falling within the ambit of the *Hobbs Act* than this one. Surely if Congress intended to exercise its full constitutional power over commerce to prevent any restrictions on the flow of interstate commerce by extortion this exploitation of the allocation of public contracts falls within the ambit of the statute's intent.

C. Count Two properly charges appellant with the wrongful use of the facilities of interstate commerce to promote extortion in violation of New York State law, and the evidence amply supported the conviction.

Count Two charges appellant with having used the facilities of interstate commerce, including the mails, to facilitate and distribute the proceeds of extortion, in violation of the laws of the State of New York. Appellant's

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[33] The salary from the Board of Elections position "supported" the non-paying Party position, to which appellant devoted the majority of his working hours (Tr. 513).

argument with respect to Count II is difficult to pinpoint with any precision. The argument begins by quoting from an opinion of the Court of Appeals for the District of Columbia Circuit which quotes extensively from the legislative history of Section 1951 and from cases which take note of the fact that organized crime activities were the principal concern of those who initially proposed the legislation which was ultimately enacted (Br. 28-31). Appellant then goes on to suggest, quite correctly (1) that "a local bribery offense cannot be converted into a federal crime merely because of an incidental interstate telephone conversation between the defendant and a federal agent" (Br. 31, citing *United States* v. *Archer*, 486 F.2d 670, 681 (2d Cir., 1973), and (2) that commercial bribery, a local petty offense, cannot be converted into a felonious violation of the *Travel Act* merely because of some interstate nexus (Br. 33, citing *United States* v. *Brecht*, Slip. Op. No. 76-1043, p. 5031 (2d Cir., July 16, 1976). The citation of these inapposite cases is followed by a brief discussion of the facts, and then, without any citation of authority, appellant concludes that the interstate nexus here " was insufficient in terms of the Travel Act prosecution and conviction entered against appellant" (Br. 32).[34] This argument is frivolous.

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[34] Appellant also suggests that Count Two, insofar as it charges extortion in violation of New York law, is defective because as a matter of law Green could not be the victim of an extortion plot, being rather the willing payor of a bribe. It should be noted that under § 155.10 of the New York penal law, the crimes of bribe receiving and extortion are not mutually exclusive, and that it is no defense to a charge of extortion that defendant, by reason of the same conduct, also was guilty of receiving a bribe. The trial judge charged the jury in the instant case that under New York law, as under federal law, the crimes were not exclusive, but that the essential fact question was whether or not the requisite elements of fear and coercion were present. (Tr. 1144). See discussion at pp. 41-43, *supra*.

First, the language of Title 18, U.S.C. § 1952 generally prohibits, without qualification, interstate travel or the use of interstate facilities to promote, manage, establish or carry on or facilitate extortion in violation of the laws of the State. And, as Judge Friendly observed, in *United States* v. *Archer*, *supra*, at 680: "[I]t would go beyond the proper exercise of judicial power for courts to confine the Travel Act to its title . . . or even the precise purpose stated to Congress by the Attorney General." See, also *United States* v. *Garramone*, 380 F. Supp. 590, 592 (D.C. Pa., 1974), *affirmed*, 506 F.2d. 1050 (3rd Cir. 1974), *cert. denied*, —U.S.— (1975). Accordingly, Section 1952 has been repeatedly applied to corruption of local public officials where the interstate travel aspects of the enterprise are neither marginal nor unforseen, even where no organized crime connection has been shown. See, e.g. *United States* v. *Kahn*, *supra*; *United States* v. *Hathaway*, *supra*; *United States* v. *DeSapio*, 435 F.2d 272 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

Second, here, in contrast to the *United States* v. *Archer*, *supra*, upon which appellant relies, and in which the only interstate communication was a contrived telephone call to a federal agent, the record shows that appellant knowingly and deliberately used interstate facilities to establish and carry on extortion. Green initially traveled to New York from Pennsylvania to meet Cristenfeld in the fall of 1969. At that time Cristenfeld demanded a cash payment of $44,000. The evidence shows that Cristenfeld was aware that Green had traveled from Pennsylvania and that the money he demanded had to be generated from Green's Pennsylvania business headquarters. Upon agreeing to make the payments, Green traveled from Pennsylvania to New York on four successive occasions, and made four successive cash pay-

ments to Cristenfeld. Cristenfeld never traveled to Pennsylvania, but it is clear that he knowingly caused Green to travel to New York in order to make the cash payments. The cash payments, which appellant required to be made to him personally, were an essential part of the extortionate demand. See *United States* v. *Hathaway, supra.*

In addition to the travel between Pennsylvania and New York, however, the interstate nexus is amply demonstrated by the use of telephones and the mail. After Green met with Cristenfeld on the second occasion and made a cash payment to him, he asked Cristenfeld if there might be some other method to meet the commitment. On March 3, 1970 Cristenfeld, in New York, phoned Green, in Pennsylvania, and instructed him to make payments to Harry Peltz, Jr., an attorney in New York, at the rate of $500.00 a month. Cristenfeld gave Green the address of Peltz in New York, and told him that these payments would be credited against the underlying demand of $44,000. Thereafter, each month for the next three years Green Engineering in Pittsburgh mailed payments to Harry Peltz, Jr. in New York. In June, 1970, appellant again telephoned Green, and instructed him to place still another person, Olga Mrozack, appellant's personal secretary, on the payroll, telling Green to pay her $50.00 a week. Cristenfeld advised Green that these payments would likewise, be credited against the underlying $44,000 demand. Thereafter, on a bi-weekly basis for the next three years Green Engineering mailed payments totalling roughly $6,000 to Olga Mrozack in New York. There was never any doubt that these payments were meant to apply directly to the underlying $44,000 "commitment" and, indeed, they totalled payments in excess of $20,000, roughly half of the total underlying demand.

In sum, the use of the mails, the telephone and travel by Green between New York and Pennsylvania were both central and necessary to the operation of Cristenfeld's unlawful scheme, and as such, are quite plainly within the activities proscribed by the *Travel Act*. See, *United States* v. *Hathaway, supra; United States* v. *Kahn, supra.*[35]

CONCLUSION

The judgment of conviction should be affirmed.

Dated: September 8, 1976.

Respectfully submitted,

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ROBERT F. KATZBERG,
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of Counsel.

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[35] *United States* v. *Brecht, supra,* cited by the appellant, held that commercial bribery, a petty offense under New York law, was not transformed into a violation of Section 1952 merely because of an interstate connection. The case is hardly apposite here, nor does it support the proposition that an organized crime connection is an essential element of an offense under Section 1952. And, indeed, in footnote 10, in *Brecht*, ignored by the appellant, the Court held that the same evidence could suffice to justify a finding that Brecht used interstate facilities to promote larceny by extortion in violation of Section 1952. (Slip Op. at 5040).

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COUNTY OF KINGS) ss.:
EASTERN DISTRICT OF NEW YORK)

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 15th day of September 19 76 he served ~~a copy~~ three copies of the within BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Raymond B. Grunewald, Esq.
Grunewald, Turk, Gillen & Caliendo, Esqs.
233 Broadway
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
15th day of September 19 76

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 77